IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ———

MARYLAND CASUALTY COMPANY, a Corp., *Petitioner*,

v.

EARL D. ALFORD, Administrator of Estate of Frederick W. Weidman, Deceased, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion in the United States District Court for the Northern District of Oklahoma is found beginning at page 54 of the Record, and is reported in 27 Fed. Supp. 176. The opinion of the Circuit Court of Appeals for the Tenth Circuit (written by Judge Phillips, and concurred in by Circuit Judge Bratton) is found at pages 125 to 130 of the transcript of the record.

The dissenting opinion of Circuit Judge Huxman is found at pages 130 to 132 of the transcript of the record. The majority and dissenting opinions, filed April 5, 1940, have not yet been published.

II.

Jurisdiction.

(1). The date of the judgment of the United States District Court for the Northern District of Oklahoma is April 6th, 1939 (Tr. 60-64). A petition for rehearing was filed in the Circuit Court of Appeals for the Tenth Circuit, and it was denied by the court on May 22nd 1940 (Tr. p. 135).

(2). The statutory provisions which are believed to sustain the jurisdiction of this court are section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; 43 Stat. 938, USCA Title 28, Section 347. Also R. S. 913, Act Aug. 1, 1842, c. 109, 5 Stat. 499. USCA Title 28, Sec. 721. Also Revised Rules of the Supreme Court of the United States adopted February 13, 1939, Rule 38 par. 5 (b). Also R. S. 921, Act July 22, 1813, c. 14, Sec. 3, 3 Stat. 21, USCA Title 28, Sec. 734 on Consolidation. Also R. S. Sec. 716, Act Mar. 3, 1911, c. 231, Sec. 262, 36 St. 1162, USCA Title 28, Sec. 377.

(3). The facts to show that the nature of the case and the rulings below were such as to bring the case within the jurisdictional provisions turn on whether or not Dave McConnell, Superintendent of the Bureau of Criminal Identification of the State of Oklahoma was performing an official act BY VIRTUE OF HIS OFFICE at the time of the accident so as to render the surety on his official bond liable. The bond appears at page 91 of the transcript of the record, and the stipulation showing the facts as to McConnell's activities at the time of the accident appear at page 90 of the record. The accident is shown in the transcript of testimony of various witnesses (Tr. pp. 101-123).

The trial court made various rulings, the gist of all of which are to the effect that McConnell was performing an official act by virtue of his office and thus the surety on his official bond was liable. See opinion of trial court (Tr. pp. 54-59) judgment on verdict (Tr. 60-64) and the courts instructions (Tr. pp. 70-79) to the effect that the jury must

find that McConnell was engaged in the discharge of his official duties.

The rulings of the trial court were all in conflict with the settled law of Oklahoma, as shown by local decisions applicable to the facts of this case. Also the decision was in conflict with the weight of authority. The cases applicable are set forth in the petition for this writ and will be discussed in the argument in this brief.

The facts as to the second point on this brief are that the trial court instructed the jury (Tr. p. 73) in substance that in the case of the mother, the *Mamie M. Weidman* case, No. 1947 in the Circuit Court of Appeals, they might take into consideration the mother's moral training, teaching and support, and that the law permits the moral effect upon their general character to be considered in determining the amount of the damages. Such instruction was clearly not the law in Oklahoma as will be later shown. The instruction was objected to at the first opportunity given by the trial court (Tr. pp. 79-80).

The Circuit Court of Appeals refused to consider this erroneous instruction, as it said (Tr. p. 130) in its opinion that under the stipulation for consolidation (Tr. pp. 2-3) the instruction was not open to review.

(4). The case believed to sustain said jurisdiction is as follows; on the question of the power of this court to review on writ of certiorari cases where a Circuit Court of Appeals has departed from state decisions on an important question of local law: *Forsyth* v. *Hammond*, 166 U. S. 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095. On the question of the power of this court to review on writ of certiorari cases where a Circuit Court of Appeals has construed a rule of this court such power is an inherent power and a means of giving full force and effect to existing appellate authority and of furthering justice.

In the matter of 620 Church Street Building Corporation et al., Petitioners, 57 Sup. Ct. 88, 299 U. S. 24, 81 L. Ed. 16.

III.

Statement of the Case.

This has already been stated in the preceding petition at pages 2 to 12, which is hereby adopted and made a part of this brief.

IV.

Specifications of Errors.

(1). The trial court erred in holding that the act of the superintendent of the Bureau of Criminal Identification of the State of Oklahoma in transporting himself and equipment from a scene of duty in Northeastern Oklahoma and to his home and headquarters in Oklahoma City, Oklahoma, was an official act BY VIRTUE OF HIS OFFICE and holding such officer's surety on his official bond was liable for death caused by the negligent driving of the officer on returning from such a mission.

(2). The trial court erred in instructing the jury that in fixing the amount of the damages the jury could take into consideration the mother's moral training, teaching and support of the things that she would have contributed towards these minor children during her life expectancy as such items of damages are too remote and speculative. And the Circuit Court of Appeals erred in holding the instruction was not open to review under the stipulation of consolidation and further the instruction was not properly challenged.

V.

ARGUMENT.

Summary of the Argument.

Point A: A surety on an official bond of a public officer is only liable for acts of his principal that are done BY VIRTUE OF OFFICE, and the act of an officer in transporting himself from one place of duty to his home and headquarters is not an act done by virtue of his office.

Point B: It is error for the Court in an action for wrongful death brought on behalf of the minor children of the deceased, to instruct the jury that in fixing the amount of the damages the jury could take into consideration the mother's moral training, teaching and support of the things that she would have contributed towards these minor children during her life expectancy, as such items of damages are too remote and speculative.

Point A.

Transportation performed by a public officer from place of duty to his headquarters or his home is not an act done BY VIRTUE OF HIS OFFICE.

The Oklahoma Statute with reference to the bond of the Superintendent of the Bureau of Criminal Identification and Investigation for the State of Oklahoma is as follows:

> OS 1931, Sec. 4732: "The Superintendent shall be appointed by the Adjutant General, with the approval of the Governor, to serve at the pleasure of the Adjutant General, and shall receive a salary of $3600.00 per annum, and shall execute a bond to the State of Oklahoma in the sum of Ten Thousand Dollars conditioned for the faithful performance of his duties."

A copy of the bond has heretofore been set out in the petition (Tr. p. 91).

A fundamental rule of suretyship that has been the law of Oklahoma as will be developed by the following decisions

is that a surety of an official bond is liable only for acts of his principal that are done BY VIRTUE OF HIS OFFICE. The Supreme Court of Oklahoma has time and time again announced the rule to be that unless the act is done by the officer "BY VIRTUE OF HIS OFFICE" as distinguished from "UNDER COLOR OF OFFICE" then the sureties are not liable, and not one of these following cases has ever been reversed or overruled or criticized and these cases were utterly ignored by the Circuit Court of Appeals.

The Superintendent of the Bureau of Criminal Identification had the statutory powers of the sheriff. O. S. 1931, Sec. 4741:

> "The various members of the Bureau are hereby authorized and empowered to make arrests without warrants for all violators (sic) of the law they may witness; to serve and execute warrants issued by the proper local authority; and shall have and exercise throughout the State the powers of sheriff, constable and municipal police officers, except the service of civil process."

This Statute is cited because some of the cases that will be cited involve sheriffs and their deputies.

The earliest Oklahoma case dealing with official acts is that of *Dysart* v. *Lurty*, (1895) 3 Okla. 601, 41 Pac. 724. The syllabus is as follows:

> "A United States Marshal and the sureties on his official bond, are not liable, in an action on such bond, for the acts of a deputy who seizes a stock of liquors, beer and other goods without any writ or process, and without the knowledge, instructions, or assent of his principal, and not in the discharge of any duty imposed upon him by law as such officer. His acts, in such case, constitute a naked trespass, for which he alone is liable."

In this case the marshal's deputy had seized a stock of liquor and other goods while serving a warrant for arrest for liquor violations. In transporting the stock of liquor,

beer, cigars, soda pop, ice and other goods at the place of business of those arrested, the goods were negligently damaged. The Okla. Supreme Court held that the surety on the official bond was not liable for the damaged property.

A later case is *Inman* v. *Sherill, et al.* (1911) 29 Okla. 100, 116 Pac. 426. The syllabus is as follows:

> "2. Sureties on the official bonds of a constable are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform some duty."

Also the case of *Jordan* v. *Neer* (1912) 34 Okla. 400, 125 Pac. 1117, wherein the court held.

> "1. Sureties on the official bond of a sheriff are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform such duty."

In this case there was a shooting affray while a raid was in progress by the officers, but the plaintiff carefully proved that at the time of the shooting the deceased was quietly walking down the street violating no law.

Another case is that of *McLain* v. *Arnold* (1918) 73 Okla. 52, 174 Pac. 563. This case has never been overruled or criticized by the Oklahoma Supreme Court.

The Court holds:

> "1. A sheriff and his bondsmen are not answerable for the wrongful acts of his deputy, unless the deputy was at the time acting within the limits of his official authority".
>
> "2. A deputy sheriff, who flees from the person he is called upon to arrest, to a waiting room in a railway station, fires his revolver through the open door of the room, and kills a member of his own party who was standing on the platform a short distance away, is not acting within the limits of his official authority." (Citing Inman v. Sherrill, and Jordan v. Neer, supra) *And the mere fact that an officer was on an official mission*

at the time of the perpetration of an illegal act is not the test to determine whether the act was within his official authority." (Italics ours.)

Another case is that of *Taylor* v. *Morgan*, 43 Okla. 143, 191 Pac. 679. The court says:

"Syll. Sureties on the official bond of a town marshal are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law or for an ommission to perform such duty."

An earlier case decided by the Circuit Court of Appeals for the 8th Circuit which was then deciding appeals from Indian Territory is that of *Chandler* v. *Rutherford*, 101 Fed. 774. This decision affirmed an earlier decision of the Court of Appeals of Indian Territory in the same case, *Chandler* v. *Rutherford*, 51 S. W. 981. This case has been cited with approval in at least twenty-eight cases.

In this case a Deputy Marshal was looking for a horse thief with his posse. They had no warrant. Horse thievery was a felony in Oklahoma and peace officers under Mansf. (Ark.) Digest Section 2002 had power to arrest without a warrant where they had reasonable grounds for believing the person arrested had committed a felony. Therefore there was nothing unlawful with the mission on which the posse was traveling, and they were out on official business. They came upon the plaintiff, who was in company with a young lady, and fired upon him after he failed to respond to their commands to halt. The trial court sustained a demurrer to the complaint, and this ruling was upheld by the Circuit Court of Appeals.

The Court says:

"The deputy's act on the occasion in question was not only unauthorized, but it did not have the appearance of being done in obedience to the mandate of the law; in other words, he did not act colore officii in any such sense or under such circumstances as will render

> the sureties responsible. And while it may seem a hardship that the plaintiff should be remitted to his action against the individuals who were guilty of the outrage, yet it must be borne in mind that it would be equally unjust to impose on the sureties a liability for a wrong in which they were in no wise concerned, and which is not within the terms of the bond."

Although the court uses the language "colore officii" we feel that a reading of the opinion will convince the Court that the holding of the court was in effect a decision that the officer must be engaged upon an official act of such an official nature that there can be no question about it, and that the shooting in this case although the officers were lawfully on a mission of horse-thief hunting was the shooting of one with whom they or toward whom an official act was being performed.

The trial court and the Circuit Court of Appeals in the case at bar ignored this line of cases and relied principally upon two cases to which a brief reference will be made, which at a first reading might seem to support the decision, but which when carefully analyzed, only support our view that Oklahoma was and has been clearly committed to the doctrine that—a surety is only liable for negligent acts of its principal when they are performed strictly by VIRTUE OF HIS OFFICE. These cases are *Meek* v. *Tilghman,* 55 Okla. 221, 154 Pac. 1190; which was a case where an officer was arresting the deceased for a misdemeanor committed in the presence of the officer, and the officer shot and killed the culprit. The other case is that of *McCorcle* v. *Morton,* 171 Okla. 632, 44 Pac. (2) 9. This was a case where the sheriff had a lawful writ and levied on the wheat of one, not the judgment debtor. The court in its opinion loosely used the language that the act was one done "colore officii", but an analysis of the opinion shows that the officer was armed with a writ and was performing an official act.

To show how clearly entrenched is the Oklahoma Supreme Court on this line of cases where the doctrine that

the act of the principal must be one *BY VIRTUE OF HIS OFFICE* before there can be liability on the surety, we refer to the following cases.

Lowe et al. v. *City of Guthrie*, 4 Okl. 287, 44 Pac. 199. Syll. 1. "The contracts of sureties on official bonds are strictiecimi juris".

(4) "Sureties on an official bond contract with reference to the law requiring such bond and regulating the duties of the principal and these laws enter into and become a part of the contract as much as if incorporated into the bond itself, and the liability of sureties can not be extended beyond the strict terms of their engagement as contemplated at the time of giving bond."

10. "Sureties on official bonds are liable only for acts of the principal done virtute officii and not for acts done colore officii."

In this case the city clerk handled and collected considerable city funds. He was only authorized by law to collect the dog tax, and embezzled considerable sums of money, including the dog tax money. The sureties on his official bond were only held liable for the dog tax money which the Court held to be in the hands of the clerk BY VIRTUE OF HIS OFFICE.

The case has been followed time and time again.

Hughes et al. v. *Board of Com'rs of Oklahoma County*, 50 Okla. 410, 150 Pac. 1029; which was a case where a court clerk's sureties were held liable for funds embezzled by their principal which came into his hands by virtue of his office.

Board of County Com'rs of Creek County v. *Vaughn et al.*, 51 Okla. 609, 152 Pac. 115. This was a case where a justice of the peace illegally collected fees which the court held did not come into the hands of the justice of the peace by virtue of his office.

Also the case of *Pitman* v. *State*, 59 Okla. 270, 158 Pac. 1137, is one that clearly holds a surety is liable for embezzled funds of his principal that came into his hands by virtue of

his office, this being a case where a county judge misappropriated funds collected by him pursuant to his order directing an administrator of an estate to pay into court an amount in excess of the inheritance tax.

Following this case, is the case of *Southwestern Surety Ins. Co.* v. *Neal et al.*, 81 Okla. 194, 197 Pac. 439, where a county court clerk was delivered funds in a probate case pursuant to court order. The clerk embezzled the money and the Oklahoma Supreme Court held that the obligation of the clerk's bond did not cover the funds as they did not come into his hands BY VIRTUE OF HIS OFFICE.

The Circuit Court of Appeals for the Tenth Circuit followed this line of cases as late as 1935, see *Globe Indemnity Company* v. *Bruce, et al.*, 81 Fed. (2) 143.

Authorities further in support of the proposition that is set out in Point A from other jurisdictions are set out in the Petition for Writ of Certiorari, but may be conveniently discussed at this portion of this brief.

Filarski v. *Covey*, 196 Cal. 504, 242 Pac. 874, where a sheriff's deputy went out to call a magistrate to court and on returning in his automobile collided with the plaintiff and in this case the court held the act was not an official act.

In *Clement* v. *Dunn*, 114 Cal. App. 60, 299 Pac. 545, the court held that the surety on the bond where a deputy sheriff on his way to serve some warrants then in his possession struck and injured plaintiff with his automobile was not liable as he was performing no official act at the time. The court particularly said the sheriff was not the "county chauffeur".

In *Usrey et al.* v. *Yarnell*, 181 Ark. 804, 27 S. W. (2d) 988, the court held the surety not liable in a case where a deputy sheriff was driving to arrest some escaped prisoners and negligently operated his car en route and struck plaintiff's automobile.

Also in the case of *McVea* v. *Day*, 6 La. App. 382, the court held that travel to a place where an official act is to be performed is not a part of the official act.

Likewise in the case of *Humphrey* v. *Ownby, et al.*, 104 S. W. (2) 398, the court held that traveling by a deputy sheriff in going to a place to perform an official act is not a part of the official act.

A strong case is that of *Gray* v. *DeBratton*, 192 La. 628, 188 So. 722, wherein the court held.

> "An official bond of sheriff cannot be construed so as to operate as a policy of insurance in favor of the traveling public against damage in an automobile collision."
>
> "A sheriff and surety on his official bond were not liable for injuries to pedestrians struck by an automobile as result of deputy sheriff's alleged negligent operation of automobile while conveying a prisoner to jail, since the deputy's act in causing injuries, if any was not committed by color of his office or by virtue of his office, and it was not an act of malfeasance, nonfeasance or misfeasance".

Another strong case is that of *McVey, et al.* v. *Gross*, D. C. N. D. Texas, Dallas Division, 11 F. (2) 379.

The court held that a deputy marshal returning from serving a warrant was performing no official act but was committing a personal wrong when he negligently drove his car colliding with the plaintiff.

The most recent case on this question is not yet officially reported, but by the time this petition and brief are being considered by the court the citation to this case will probably be available. We refer to the case of Lee E. Nelson, personally and on his own behalf and as guardian ad litem of his minor son, *Robert Lee Nelson*, v. *Jeff Bartell, Sheriff, et al.*, decided by the Supreme Court of Washington, opinion filed May 25th, 1940. The case expresses so well our contention as to the weight of authority that we ask the court's indulgence in setting out the facts and a portion of the opinion.

The case was decided below on demurrer. Plaintiff alleged in his petition that the injuries occurred in an accident

when a deputy sheriff had been commanded by a court then in session to serve subpoenas. The parties in their briefs in effect stipulated that the deputy sheriff had been to Aberdeen (Washington) to serve subpoenas and was returning to his duties when he collided with and injured the plaintiff.

The Washington Statutes (Rem. Rev. Stat. #4160) provided that the sheriff may appoint as many deputies as he may think proper, "For whose official acts he shall be responsible at the amount of their (his) bond." Also that the sheriff "Shall be responsible on his official bond for the default or misconduct in office of his deputies." Section 9932 of the same statutes provided that every official bond executed by any officer shall be in force and "to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity."

The Washington Supreme Court analyzed the decisions of many courts and held that the Sheriff is only liable on his bond with respect to the act of his deputy if such act constituted a default or misconduct in office, and said that official bonds may be resorted to by those persons only who may be aggrieved or injured by the wrongful act of the officer, "IN HIS OFFICIAL CAPACITY."

The language of the Court is so cogent and applicable that we quote the final paragraph of the opinion:

> "As we have seen, the majority of the cases from other jurisdictions support the conclusion reached by the superior courts. These authorities are, of course, not binding upon this court, and this is especially the case in the instant matter because of slight differences in the wording of the statutes involved, but when, with the express language of our own statutes in mind, thoughtful consideration is given to such questions as the following, we reach the same result; why are official bonds required by law, and particularly from sheriffs and other police officers? Is it not because, when they become officers, they are endowed as such with

special and extraordinary official powers which are peculiarly susceptible of abuse, such as, for example, the power to arrest, imprison, search and seize, distrain and sell, etc.? And is it not reasonable to conclude that the official bonding system was created with the sole purpose and intention of protecting the public against their abuse of the extraordinary powers conferred upon them as officers; and that the system is in no way intended to furnish protection against the abuse of those general and ordinary powers which they, as non-officials, formerly possessed and were accustomed to exercise? One would logically expect that to be the case, and, from the explicit language used in our statutes, such as,'default or misconduct in office' and the provision that such bonds may be resorted to 'for the use and benefit of' persons who may be injured or aggrieved 'by the default of such officer in his official capacity,' we think that it is the case."

We therefore urge in support that the decision of the Circuit Court of Appeals is in conflict with the weight of authority.

Point B.

The instruction that the jury could consider the mother's moral training, teaching and support was erroneous.

This instruction, (Tr. p. 73), was erroneous because it allowed the jury to consider more than pecuniary loss. The court laid down a rule that more than pecuniary matters could be considered. The instruction said:

> "You know a mother sometimes contributes more than a pecuniary support to minor children, but the law permits the moral effect upon their general character to be considered in determining the amount of damages you will award."

The rule in Oklahoma is that plaintiff is limited to pecuniary loss. *Missouri, O. & G. Ry. Co., et al.*, v. *Lee*, 73 Okl. 165, 175 Pac. 367.

> "In an action by a surviving widow for damages sustained for the wrongful death of her husband, alle-

gations in the petition that plaintiff has suffered great mental anguish by reason of his death, and for loss of his society, comfort, association, love and protection, should, upon proper motion, be stricken, as they are not proper items of damage on which to take a recovery."

Blunt v. *Chicago, R. I. & P. R. Co., et al.*, 70 Okl. 149, 173 Pac. 656.

"In an action brought under section 5281, Rev. Laws 1910, for wrongful death of a spouse, parent, or child, the plaintiff is limited in damages to pecuniary loss sustained by the wrongful death."

The question arises in connection with this point whether the question of this erroneous instruction could be considered in view of the stipulation that the case 1946, the *Frederick W. Weidman* case and the case No. 1947, the *Mamie M. Weidman* case could be consolidated. (See Tr. p. 1-3 for the motions and stipulations for consolidation.)

The majority opinion of the Circuit Court of Appeals was that the instruction was not open to review. (Judge Huxman dissenting.) However, we submit that under the statute for consolidation, R. S. 921, 3 Stat. 21; U. S. C. A. Title 28, Sec. 734, the question could be considered and also that a reading of the motion and orders for consolidation and the stipulations thereon show that the intent of the parties was to permit one record and one brief to be printed to avoid unnecessary expense.

This court has the power to review procedural questions. See—*In the Matter of 620 Church Street Building Corporation, et al., Petitioners*, 57 Sup. Ct. 88, 299 U. S. 24, 81 L. Ed. 16.

The majority opinion was also to the effect that even if the instruction was objectionable, counsel did not properly and timely object to the instruction. The record (Tr. p. 79) shows that counsel for the defendant objected at the first opportunity given by the Court and objected to the instruction in its entirety.

Conclusion.

It is therefore, respectfully submitted that this case is one calling for the exercise of the court's supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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